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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

Dennis J. Pickens,

Petitioner,

v.

Soo Line Railroad Company,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit
Case No. 00-1497SIDM

PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTIONS PRESENTED

1. Does the proper standard of review for granting judgment as a matter of law on a defendants Rule 50 Motion allow the district judge to consider only the moving party's evidence, including evidence submitted post-trial and completely disregard all evidence favorable to the non-moving party?

2. Under the Americans With Disabilities Act is the standard of proof for proving intentional discrimination greater than a preponderance of the evidence as in other civil cases?

3. In an ADA employment discrimination case, when the employer proffers several legitimate non-discriminatory reasons for termination, is the employee required to prove beyond reasonable doubt that all the proffered reasons are pretextual in order to survive judgment as a matter of law?

The Americans With Disabilities Act, 42 USC 12111(9)(B), clearly states; "Reasonable accommodation. The term reasonable accommodation may include (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, ..."

4. Can a district court judge arbitrarily rule that a part-time or reduced schedule accommodation is "unreasonable" as a matter of law, despite the contradicting provision of the ADA, no evidence of undue hardship and when controlling authorities indicate that "reasonable accommodation" is a factual issue for jury determination?

The law and this Court have historically provided special protection for railroad employees suffering injury caused by a railroad's defective equipment since enactment of the Federal Employers Liability Act (FELA).

The Americans With Disabilities Act (ADA) provides protection for disabled employees from discrimination by their employer.

5. In an employee's subsequent ADA trial, should the district judge be allowed to rule evidence from an employee's previous FELA trial to be inadmissible, then use the FELA trial evidence against the employee in granting judgment as a matter of law in favor of the employer?

6. Should the doctrine of judicial estoppel apply in a case in which the employer (Railroad), in an employee's FELA injury trial, represented to the court that they could and would continue to provide the employee with a future part-time or reduced schedule accommodation and then in a subsequent ADA trial represent to the court that they cannot and will not accommodate the employee?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Dennis J. Pickens, Plaintiff/Appellant
   Acting pro se

2. Soo Line Railroad Company, Defendant/Appellee

3. Thomas J. Conley, Attorney for Defendant/Appellee

4. Kevin J. Driscoll, Attorney for Defendant/Appellee

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In The

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Dennis J. Pickens,

Petitioner,

v.

Soo Line Railroad Company,
doing business as C.P. Rail Systems,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Dennis J. Pickens respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit Court affirming the District Court's grant of judgment as a matter of law for the Defendant is reported at 264 F.3d 773 and reprinted in the appendix hereto ("App.") at A-1. The opinion of the District Court granting Soo Line Railroad judgment as a matter of law is unreported and unpublished and is reprinted at A-17.

JURISDICTION

The judgment of the Eighth Circuit Court was entered on August 30, 2001. A timely petition for rehearing and rehearing en banc was denied on December 19, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves the interpretation and enforcement of the protective provisions provided for employees with disabilities under the Americans With Disabilities Act, 42 U.S.C. § 12101. Although this unusual case has a unique relationship with a previous FELA case, which Petitioner believes this Court should take notice of and explore, interpretation of FELA is not required.

INTRODUCTION

A jury in the United States Court for the Southern District of Iowa found that Petitioner, Dennis Pickens, was terminated from his railroad job due to his disability, in violation of the Americans With Disabilities Act (ADA). Six months after trial the District Court nullified the jury's verdict and granted Defendant (Soo Line Railroad) judgment as a matter of law based on an "unreasonable jury" and "insufficient evidence" ruling. Petitioner timely appealed the District Court's ruling to the Eighth Circuit Court of Appeals which affirmed the District Court's ruling in a 2 to 1 split decision.

STATEMENT OF THE CASE

Appellant Dennis Pickens, now age 50, worked as a conductor in Ottumwa, Iowa for the Soo Line Railroad, from

1974 until August 16, 1996. He performed his duties competently and safely, and was earning nearly $50,000 per year with fringe benefits worth $17,000 per year. On October 14, 1992 Pickens suffered a severe back injury when the braking system malfunctioned while on duty in the caboose of a Soo Line train. Pickens suffered a herniated disc in the low back, and associated soft tissue damage. Pickens work injury was processed under the Federal Employers Liability Act (FELA).

Accommodation Prior To FELA Trial

Pickens was off work almost 3 years and after reaching maximum medical recovery returned to work at the railroad. Because of Pickens injury, disability, and medical restrictions it became necessary to request an accommodation to allow his return to work.

Pickens requested and Soo Line offered to return Pickens to his conductor position at a reduced schedule of 4 days per week.[1] Due to Pickens' disability and the inconsistent working schedule and after consulting with his doctor, it was determined that the most effective accommodation was to simply work when Pickens was physically able and to "lay off" (take day off) when he felt he could not perform his duties in a safe and efficient manner. Pickens would simply call the crew manager at Soo Line and "lay off" on "old company injury". This practice was a reasonably normal part of the overall operation of the Railroad. The Collective Bargaining Agreement allowed any conductor to "lay off" for any reason. This accommodation appeared to work quite well for both Pickens and Soo Line Railroad. The accommodation was an effective solution

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[1] Soo Line first attempted to accommodate Pickens at a "switchman" position, but this was more physically demanding than a conductor position and proved to be ineffective. (Soo Line claims Pickens "walked off the job" which was litigated in the FELA trial, then raised again in the ADA trial)

until Soo Line decided to arbitrarily remove Pickens' medical restrictions and the accommodation without consulting or informing Pickens or Pickens' doctor.

FELA Trial

Pickens continued to work in this manner from November 1995 until March 1996 with no complaint or warning from Soo Line Management. Pickens found it necessary to proceed to trial to collect damages for his personal injury, which was held in United States Court for the Southern District of Iowa, March 25 - 29, 1996. From the onset of the trial and throughout the trial, Soo Line and their attorney (Todd Gaffney) without ambiguity represented to the Court, jury and Plaintiff that Soo Line would continue a two to three day a week work accommodation for Pickens employment after the trial, inferring that the "accommodation job" would not negatively affect Pickens' employment. In opening argument Mr. Gaffney stated to the jury, **"Bottom line is Mr. Pickens is still our employee. He is working. When this case is over, he'll still be working, he'll still be our employee, if he wants to work five days a week, he's got our okay to work five days a week. If he wants to work two days a week, he has our okay to work two days a week.** But we believe in Mr. Pickens. We believe he is capable of doing more than what his counsel apparently does, so thank you very much. We appreciate your cooperation."

Mr. Gaffney even went so far to proclaim to the jury **"So he was averaging three days per week," (prior to injury), "earning--working twenty-five hours earning almost $50,000—I'd like that kind of job—with benefits." "And can he work three days?** He's worked five days just sitting here, and I bet he has met with his lawyer on Sunday to get ready for this case."

In closing arguments to the jury, Mr. Gaffney clearly reminded the jury from his opening statements; **"He is our**

employee, he's remained our employee. Whatever you do, he's going to still be our employee. He's going to have every opportunity to work as many hours as he wants to. That's what's different about this case. It's kind of unusual, but he's still going to be our employee.
The representations and promises for accommodation were clearly made. The FELA jury returned a "compromise verdict" awarding the Plaintiff $365,188.00[2] based on Soo Line's representations.

POST FELA ACCOMMODATION

Subsequent to the FELA trial Pickens continued to work under what he had perceived as a promise of continuing the proposed accommodation as represented in the FELA trial. **Because of Pickens' belief that the accommodation would continue he acted accordingly and did not request assignment to another position.**

On May 27, 1996 Pickens "laid off" on "old company injury" due to his disability. Soo Line management reacted in a somewhat hostile manner demanding that Pickens see his doctor and return a form called a Health Status Report (HSR). To attain the HSR, Pickens had to meet with his immediate supervisor, trainmaster Dan Carlson. Pickens explained to Mr. Carlson about his disability and understanding of his 2-3 day per week accommodation, in which Mr. Carlson stated; **"If you can't work more than two days a week you shouldn't have been allowed to return to work and why don't you just quit."[3]**

In over twenty years of employment with the Railroad, Pickens had never seen this form HSR, nor had his doctor. The HSR had two boxes, one showing the employee

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[2] Pickens' net award after dispersal of funds just barely covered Pickens lost wages for three years. There was no windfall from FELA.
[3] Pickens was never warned or told that the accommodation had been discontinued or that he was doing anything wrong. Soo Line claimed they were just concerned about Pickens medical condition.

was released to part-time duty, and one for full-time duty. Pickens' doctor stated that he wanted to check the box showing part-time duty. Pickens asked the doctor if he could check the box showing full-time duty based on Pickens' understanding of what his accommodation was. During the FELA trial, the doctors that testified and the Soo Line managers seemed to agree that it would be satisfactory for Pickens to be released to a full time basis with the understanding that if his back condition flared, that it would be necessary to allow Pickens to "lay off". Pickens' doctor checked the "full-time" box and included a notation that Pickens' "back pain would flare and that he would have difficulty working", believing this was an appropriate means of keeping Pickens restrictions and accommodation in place and allowing Pickens to work in a safe manner. Pickens returned the HSR to the Railroad and after a 14 day period, he was allowed to return to work.

Pickens continued to work the reduced schedule accommodation without complaint from Soo Line until August 16, 1996. When Pickens "laid off" on "old company injury" due to his disability, again Soo Line demanded that Pickens return another HSR from his doctor. The HSR was filled out by Pickens doctor the same as the previous HSR and returned to Soo Line on August 19, 1996, however Pickens was not allowed to return to work. On August 29, 1996, Pickens contacted a company nurse and was told he could not be allowed to return to work until further medical information was provided. The necessary medical information was never explained and Pickens was never notified of his release, or allowed to return to work.[4]

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[4] During Pickens subsequent ADA trial Soo Line claimed that the necessary medical information was received on September 4, 1996, although they couldn't recall what the information was, and that Pickens had been released to work on September 5, 1996, although Pickens was never notified and there is no record of a September 5th release other than a belated letter from Soo Line dated September 19, 1996.

On September 6, 1996 Pickens, attempting to return to work, wrote a letter to Soo Line manager Greg Simmons[5] who had handled Pickens injury claim and was involved in the FELA trial. The letter was also copied to Dr. Janiga, Soo Line company doctor, and to company vice-president Dodge. The purpose of the letter was to make the company aware of safety concerns if he was required to work in a manner that exceeded his restrictions and what were the requirements for Pickens to return to work. In the letter Pickens reminded Mr. Simmons of his understanding of his accommodation and the representations made by Soo Line and their attorney, Mr. Gaffney. Pickens stated that he would remove restrictions "if required" and would disregard safety and common sense "if required". Pickens closed the letter stating he would not quit as Mr. Carlson had suggested and asking what the "requirements" were to return to work.

Soo Line did not respond to Pickens' letter or return him to work. Soo Line did send Pickens a notification that he was being charged with (1) "laying off under false pretenses" and (2) "threatening the safety of himself, other workers and the public."[6]

Soo Line held a customary "standard investigation", presided over by a railroad official, and decided by a company official. The "laying off under false pretenses" charge was based on an unwritten and secret company policy under which the Railroad allows injured employees to lay off on company injury as long as the employee's FELA claim is still open, but lay off on company injury is not allowed after the FELA claim is tried or settled. Pickens FELA case had been tried and payment had been received.

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[5] Greg Simmons was the Soo Line's claims manager who was involved with Pickens in his treatment, rehabilitation, and the accommodations in his return to work. Mr. Simmons represented the Railroad in Pickens' FELA trial and was present, testified, and seated at the defendant's table the entire trial.

[6] In Motion for Summary Judgment Soo Line proffered other reasons for termination, including "falsifying medical condition" and "excessive absences" At trial Soo Line also claimed Pickens was fired due to his "belligerent attitude"

However Pickens was unaware that he was not allowed to use his permanent injury as a reason to lay off. Soo Line's questionable position was that Pickens had laid off on "old company injury" and Soo Line had no record of any injury.

The "safety threat" charge was based on the letter that Pickens sent to Soo Line in his attempt to return to work. Soo Line's charge was that Pickens' statements in his letter of "disregarding safety if required" and "removing restrictions if required" was that Pickens was somehow threatening to work in an unsafe manner or cause some sort of accident. Pickens explained to Soo Line officials his understanding of his accommodation and need to lay off. Pickens further explained his intent and interpretation of the letter, stating that the safety comments were directed at the issue of the removal of the accommodation and his personal concerns for safety. Soo Line chose not to accept Pickens explanations and terminated Pickens on October 4, 1996.

ADA TRIAL

Pickens filed suit against Soo Line Railroad in United States Court for the Southern District of Iowa for wrongful termination under the Americans with Disabilities Act, and alternate theories of express and implied contract and equitable estoppel. The contract and estoppel theories were based on the promises and representations made by Soo Line and their attorney in the previous FELA trial and the actions of Soo Line in representing to Pickens that he would be allowed to work a reduced schedule or part-time accommodation and allowing him to work the part-time schedule without complaint both prior to and after the FELA trial. The ADA discrimination claim was tried to the jury

and the contract and estoppel claims were to be determined in a bench trial to the Court.[7]

A motion in limine was filed by Soo Line to exclude evidence from the prior FELA trial. The Court ruled that Pickens ADA claim was distinct and separate from his previous FELA claim and that all evidence from the FELA trial was inadmissible and that there was to be no reference to the prior FELA trial. This ruling by the Court virtually eliminated Pickens' contract and estoppel claims because the District Court refused to admit into evidence any of the admissions or representations Soo Line and their attorney made in the FELA trial. This ruling also excluded several Soo Line company memos and documents including the transcript of the termination hearing and even the critical evidence of the letter that Pickens wrote to Soo Line that the District Court used as the basis in granting judgment in favor of Soo Line.

Despite the exclusion of critical evidence favoring Pickens, the jury still found in favor of Pickens. This was in part due to the total lack of credibility of Soo Lines' entire case. Soo Lines' claim that Pickens "laid off under false pretenses" fell apart early in the trial. Despite the evidence of Pickens' injury and Soo Line records acknowledging Pickens' disability, Soo Line claimed to have no knowledge of an injury. Soo Line counsel even attempted to drop this argument from its defense by admitting to the Court; "The record shows he didn't really lay off under false pretenses."

Soo Line entered into evidence a letter from their company doctor stating that Pickens was released to full duty, without restrictions, thereby claiming that Pickens was not disabled. Considering Soo Lines' own records showed Pickens to be disabled and the Railroad Retirement Board record of Pickens' disability, Soo Line changed course and argued that Pickens was disabled, but only from his

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[7] When the jury found in favor of Pickens, the Court ruled the bench issues were "moot".

conductor position. In cross-examination Soo Lines' doctor could not explain the discrepancy between his letter claiming Pickens was not disabled *and the Railroad* Retirement Board's finding that Pickens was disabled, while using the same medical records.[8]

Soo Line witness Simmons testified "I don't recall on that" when questioned on what Pickens' accommodation job was, despite the fact that Mr. Simmons was totally involved in Pickens' return to work and establishing the "accommodation jobs". Soo Line witness Graham then testified "To my knowledge he had been on a part-time working relationship with the Soo at that point in time prior to mid August." when asked if Soo Line had returned Pickens to work on a two to three day basis.[9] Soo Line's attorneys were arguing to the jury that they had no knowledge of a part-time accommodation.[10]

Soo Line argued to the jury that Pickens was a "safety threat" due to his statement in his letter regarding "removing restrictions if required", which was totally contradicted by their claim that Pickens had no restrictions and their complete approval of Pickens previous removal of his eight-hour restriction.

Soo Line argued to the jury that Pickens was a "safety threat" due to his statement in his letter stating that he would "disregard safety if required" while testifying that Pickens had worked in a safe and efficient manner and despite the fact that Soo Line company Dr. Janiga had written a letter releasing Pickens back to work dated two weeks after Pickens had written his letter. Soo Line witness Denny also testified that Pickens was stating "his opinion" in answering the question if Soo Line was "going to require

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[8] The jury could have rightfully and correctly inferred that it was actually Soo Line that was falsifying Pickens medical condition.

[9] Pickens had always been released on a full-time basis with the understanding that intermittent "lay offs" would be allowed for resting his injured back, thereby creating the part-time accommodation.

[10] This was argued despite their complete knowledge of representations made in the prior FELA trial.(The attorneys were from the same law firm)

Pickens to work unsafe." Mr. Denny also testified in an "offer of proof" that Soo Line had a company policy which allowed injured employees to be accommodated prior to settlement of their FELA claim, but once a FELA claim has been settled, accommodation is no longer allowed.[11] This company policy clearly has a discriminatory effect which is prohibited under the ADA.

One of the major issues in the jury's determination of credibility was the fact that Soo Line witnesses and their attorneys misquoted Pickens' letter by only referring to the two statements regarding "safety" and "restrictions" and leaving out the words "if required" throughout the entire trial. Soo Line knew that the words "if required" do in fact change the entire meaning of the statements.[12] Because the letter was directly related to Pickens disability and request for accommodation and Soo Line admitted Pickens was terminated because of the letter, the jury was free to infer that Pickens' disability was the motivating factor in his termination and that Soo Line's claim that Pickens was threatening safety was nothing more than a self-serving interpretation with the intent to fire Pickens.

The jury returned a verdict in favor of Pickens and awarded $95,867.15 in past lost wages and benefits and $525,000 in past mental pain and suffering. The District Court entered judgment for Pickens in the amount of $95,867.15 for lost wages, but reduced the award of past pain and suffering to $300,000 due to the federal statutory cap.

Soo Line moved for judgment as a matter of law before the case went to the jury and after the jury rendered its verdict, but both were denied by the Court. (Judge Wolle)[13]

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[11]This testimony was proffered outside the presence of the jury and was not admitted into evidence because of reference to "settlement"

[12] The letter was not admitted into evidence thus not viewable by the jury. After beginning deliberations the jury asked to see the letter, in which the Court allowed a redacted version of the letter to go to the jury.

[13] In denying summary judgment, Judge Wolle held that "fact questions abound". At the close of evidence, Judge Wolle stated, "I think this is a case in which the

After the trial Soo Line submitted to the Court their Rule 50 Motion which contained many inaccurate and misleading facts and representations and evidence submitted post-trial that the jury did not see or hear. After considering the case for six months Judge Wolle granted judgment as a matter of law for Soo Line Railroad setting aside the jury's verdict in favor of Pickens. In rendering his opinion, Judge Wolle simply accepted Soo Line's version of all factual disputes and copied some word for word from Soo Line's brief thereby allowing the defendant to re-determine all fact issues decided by the jury, totally usurping the function of the jury. In ruling that the jury was "unreasonable" the Court used facts and evidence that were not admitted into evidence and that the jury did not see or hear. Despite Judge Wolle's statements at trial, [7] his opinion is stated as though there was not a shred of evidence in favor of Pickens and only refers to evidence favorable to Soo Line, much of which was submitted post-trial and lacks factual support. Many of Judge Wolle's reasons for granting judgment for Soo Line were based on Soo Line's claims in post-trial briefs that Pickens accommodation job somehow conflicted with the Collective Bargaining Agreement (CBA) between Soo Line Railroad and the United Transportation Union. However, Soo Line was unable to quote any citation of the CBA showing any conflict because there is none. Judge Wolle also ruled prior to trial that the CBA would not be admitted into evidence due to Soo Lines failure to provide Pickens' attorney with all documents relative to the CBA. The jury did not see or hear any evidence concerning the CBA, nor did Soo Line argue or ask that the issue of CBA conflicts be included in any jury instructions.[14]

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jury must make fact determinations, so it's not appropriate for judgment as a matter of law..."

[14] The majority opinion of the Eighth Circuit abandons all mention of CBA conflicts.

APPEAL

Pickens timely appealed the District Court ruling to the United States Court of Appeals for the Eighth Circuit. Eight months after oral arguments and submission of the case, the Court of Appeals, in a 2-1 split decision affirmed the ruling of the District Court. The majority opinion closely resembles the District Court opinion and as the dissenting opinion points out , "The majority, however, recites a version of the facts closely mirroring those set forth in Soo Line's brief, rather than those facts that tend to prove Pickens' case."

The majority makes much of Pickens', so called, "excessive absences" by stating that "regular and reliable attendance is a necessary element of most jobs", then citing several cases in which the plaintiffs did have regularly scheduled working hours and were disciplined or fired due to excessive absences.[15] However. the majority fails to decide issues on a case by case nature as required. The majority should not be allowed to ignore the undisputed fact that Pickens railroad conductors job whether with or without accommodation is anything but regular and reliable.[16] There are no scheduled days or hours to work. Conductors have no assigned "days off" or holidays and in fact do work as they choose by invoking their "lay off privileges. The only time a conductor reports for duty is when the railroad calls and tells him when and where to report. It is undisputed that a conductor may not be called to work for several days or even weeks. It is also undisputed that Pickens did in fact perform the essential functions of his accommodated position in a safe and efficient manner for five months prior to the FELA trial and

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[15] Soo Line failed tō include attendance in its "essential function" instruction and did not raise "essential function" in its Rule 50 motions.

[16] Soo Line has argued post-trial that regular and reliable attendance i s an essential function, the irony to which at the same time they were actually paying conductors to stay off the call board and not work.

for - five months following the FELA trial, until his termination. In fact Pickens' immediate supervisor trainmaster Carlson testified that he was satisfied with Pickens' ability to work safely and efficiently. When Mr. Carlson was questioned as to whether he had a discussion with Pickens about his "lay offs", Carlson avoided the answer by responding, "I'm sure we discussed...his medical history." There is absolutely no evidence that the accommodation or "lay offs" were in any way a problem or even an inconvenience for Soo Line. The majority also ignores the important evidence that Pickens only worked 3.3 days per week prior to his injury which was considered "full-time" and there was no evidence that Soo Line required "regular and reliable attendance". However, when Pickens became disabled and needed a 2-3 day per week accommodation Soo Line suddenly decided to make it a problem and suddenly regular and reliable attendance became an essential function of the job and 3 days per week was insufficient. This would at least raise an inference of disparate treatment by allowing the employee "lay offs" prior to disability, but not when the employee is disabled. The issue of "excessive absences" was never raised until after Pickens filed his ADA claim. The evidence revealed in the Soo Line termination hearing, [17] was that the actual "lay off" or, so called, absence [18] was not a problem, it was the reason given ("old injury" or disability) for the lay off that was the problem. The issue of "excessive absences" was never raised or argued to the jury. It is also undisputed that any conductor can "lay off" for any reason, but apparently, according to the Court's ruling, a disabled conductor loses that right when laying off due to his disability. This too would have an inference of disparate treatment.

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[17] The transcript of the termination hearing was not admissible due to references made concerning the FELA trial.

[18] Soo Line never considered a "lay off" an absence and there was no attendance policy.

The majority's ruling concerning the letter that Pickens wrote to Soo Line in which Soo Line alleges that Pickens threatened safety amounts to nothing more than the Court re-determining the facts and the credibility of witnesses. The only evidence that Soo Line presented on their "direct threat" claim was their own self-serving and selective interpretation of the letter. Soo Line took a dangerous approach in arguing to the jury that the termination of Pickens was solely due to the letter. Despite their other claims of "laying off under false pretenses", "falsifying medical condition", and "belligerent attitude" they chose to basically abandon these reasons and pare the termination down to the "if not for the letter". This is akin to stating "if you don't believe these reasons, would you believe the "letter" was the reason". By the time Soo Line argued this to the jury their credibility was nonexistent. The "laying off under false pretenses " charge had been discredited because they claimed they had no record of an injury. The charge of "falsifying medical condition" was discredited because of the obvious tactic that Soo Line was simply picking and choosing what medical information they wanted to use or accept. If the medical report or evidence wasn't favorable to Soo Line they would just ignore it. Soo Line's company doctor couldn't explain the discrepancy in his claim that Pickens was released to full duty without restrictions and the Railroad Retirement Board's determination that Pickens was disabled, while using the same medical records. The charge that Pickens had a "belligerent attitude" had no support other than Soo Line's belated, after the fact, self-serving testimony. There was no evidence that Pickens yelled, used abusive language, or was disruptive in any way.

The problem with the Eighth Circuit's ruling is that all of the proffered reasons given for termination are directly related to Pickens disability, accommodation or lack of accommodation, and prior discriminatory acts of refusing to allow Pickens to return to work. When all reasonable

inferences are allowed in Pickens' favor the jury was more than justified in finding in his favor.

This Court has previously ruled, "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts." "Thus to enter judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial." (Emphasis added). *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S: 29 (1944).

I. THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT CERTIORARI TO PROVIDE GUIDANCE TO THE CIRCUIT COURTS AS TO THE PROPER STANDARD OF REVIEW FOR GRANTING OR DENYING JUDGMENT AS A MATTER OF LAW IN EMPLOYMENT DISCRIMINATION CASES FILED UNDER THE AMERICANS WITH DISABILITIES ACT.

Despite this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed.2d 105 (2000), the Eighth Circuits decisions in cases involving the Americans With Disabilities Act, 42 U.S.C. '12101, et. seq. (1994), continue to perplex litigants more than any other subject matter. Federal judges in the Eighth Circuit and most other circuits are regularly depriving victims of employment discrimination their fundamental rights of access to the courts or right to a jury trial by arbitrarily granting summary judgment or judgment as a matter of law in favor of the employer. Judges are often times citing the correct standard of review, but are

improperly and intentionally following a standard that fits their own personal view and opinion.

In studies performed by Professor Ruth Colker it was concluded that plaintiffs were losing ADA cases, both at the trial level and at the appellate level at the alarming rate of 94%. These results are worse than results found in comparable areas of the law; **only prisoner rights cases fare as poorly.** This study concluded from empirical data that this alarming loss rate was resulting from the Court's abuse of the summary judgment device and trial courts **substituting their own normative judgments for that of the jury, i.e. denial of the right to a jury trial.**

Abuse of the summary judgment device takes two forms. First, district courts are refusing to send "normative" factual questions to the jury, such as issues of whether an individual has a disability, whether an individual is "qualified" to perform what are considered to be the "essential" functions of a job, whether a requested accommodation is "reasonable," whether the risk that an individual poses at the workplace is "significant" enough to constitute a "direct threat," and whether the hardship by an accommodation is "undue." Instead, trial courts are substituting their own normative judgments for that of the jury.

Under the Rehabilitation Act, the section 504 case law strongly suggests that many of the normative questions raised by ADA cases such as whether the plaintiff has a disability, whether an accommodation is reasonable, whether a hardship is undue, or whether a purported threat poses a significant risk to the health and safety of others, should be decided by juries rather than judges if the evidence presents a genuine issue of material fact. The cases make clear that these kinds of determinations require normative judgments and factual inferences that are in the province of the jury rather than the judge.

This Court and lower courts have mostly characterized disability-related issues under the

Rehabilitation Act as factual in nature. In *School Board v. Arline,* this Court emphasized the "factual" nature of the direct threat defense in a case involving the contagiousness of a school teacher with a record of tuberculosis. The First Circuit has held that the questions of whether a plaintiff is disabled and whether a plaintiff was fired because of his or her disability are questions of fact, so long as the facts make these issues a "debatable question." See *Katz v. City Metal Co.*, 87 F.3d 26, 32 (1st Cir. 1996).[19] The Second Circuit has held that whether one is a "substance abuser " and an "otherwise qualified" individual with a disability are questions of fact that should not be resolved by the judge on a motion for summary judgment. See *Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511, 520 (2nd Cir. 1991).

The Fourth Circuit has used the *Arline* decision to emphasize the need for detailed factual determinations before a judge even considers a summary judgment motion on issues such as whether a plaintiff is otherwise qualified, entitled to reasonable accommodation, or disabled. See *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823 (4th Cir 1994). The Sixth and Seventh Circuits have held that the question of whether a plaintiff is 'otherwise qualified" is a question for the jury. See *Tuck v. HCA Health Serv., Inc.*, 7 F.3d 465 (6th Cir. 1993), *Fedro v. Reno*, 21 F.3d 1391, 1396 (7th Cir. 1994). The Eighth Circuit has held that the issues of "reasonable accommodation" and whether a plaintiff has a disability are questions of fact. See *Frye v. Aspin*, 997 F.2d 426, 428-29 (8th Cir. 1993), and *Oesterling v. Walters*, 760 F.2d 859, 861 (8th Cir. 1985). The Ninth Circuit has held that whether an individual is disabled is factual in nature and proper for submission to a jury so long as a plaintiff has presented credible evidence of his or her condition. See *Collings v. Longview Fibre Co.*, 63 F.3d 828, 835 (9th Cir. 1995). The Eleventh Circuit has held that whether a plaintiff was

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[19] In *Katz v. City Metal,* the district court judge admitted that his "personal experience" of having heart problems influenced his decision.

discriminated against solely on the basis of a disability is a question of fact. See *Jackson v Veterans Admin.*, 22 F.3d 277, 281 (11th Cir. 1994).

Where a genuine issue of material fact exists, it is the jury, not the judge, that should decide these issues. Their resolution of these issues will depend upon individualized findings in each case. See *School Bd. v. Arline*, 480 U.S. 273, 274 (1987). The decisions under the ADA, however, have not followed this section 504 precedent; instead, judges are routinely deciding fact-intensive cases without sending them to the jury. Although the nonmoving party must go beyond the pleadings to defeat a motion for summary judgment, he or she **"need only present evidence from which a jury might return a verdict in his favor."** See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). The evidence need not compel only one reasonable conclusion. (Emphasis added)

In all circuits judges are characterizing factual issues as matters of law in granting summary judgment or judgment as a matter of law. They also raise the threshold of proof higher for ADA plaintiffs, often ignoring evidence or possible inferences that may be favorable to the plaintiff. Evidence of this theory is further supported by Catherine J. Lanctot, in which she states; "This trend of raising the threshold of proof to defeat a motion for summary judgment is also now arguably infecting the ADA." See *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 Hastings L.J. 57, 87-88 (1991).

Further reports conclude that the data shows defendants far more likely to win on appeal than plaintiff, and in fact, in 88 cases the plaintiffs had a 91.5% chance of losing an appeal, even when defending a jury verdict. See Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev., 99 (1999);
Colker, *Winning and Losing Under the Americans With Disabilities Act*, 62 Ohio St. L. J., 239 (2001).

Regarding the evidence necessary to create a factual issue under Title VII of the Civil Rights Act of 1964, this Court previously stated: "The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the [ultimate question:] whether plaintiff has proven "that the defendant intentionally discriminated against [him]' because of his race," [disability]. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. **[R]ejection of defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required."'** *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 and restated in *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S 133.

This Court stated further in Reeves the proper standard in rendering judgment under a Rule 50 motion: "Rule 50 requires a court to render judgment as a matter of law when a party has been fully heard on an issue, and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. Thus the court must review all of the evidence in the record, cf., e.g., *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, **drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence,** e.g., *Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 554-555. **The latter functions along with the drawing of legitimate inferences from the facts, are for the jury, not the court.** *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255. **"Thus, although the court should review the record as a whole, it must**

disregard all evidence favorable to the moving party that the jury is not required to believe."

Despite these clear guidelines, there is a clear and disturbing pattern in most circuits that many judges, rather than showing impartiality, are showing an obvious favoritism for the defendant employers in reviewing ADA cases. There is even a dissent among judges in the Eighth Circuit as to the proper standard of review of a motion under Rule 50 and Rule 56.

In a dissenting opinion in the ADA case of *Louis Kampouris v. The St. Louis Symphony Society*, 210 F.3d 845 (2000), Chief District Judge Bennett stated: "I conclude that the record before the district court shows that there are genuine issues as to material facts in this case , and that the moving party was not entitled to a judgment as a matter of law, see FED. R. CIV. 56(c), and the district court was not entitled to disregard or decide those factual issues by rendering an ultimate decision on the merits. Furthermore, as the Supreme Court said in *Jacob v. New York*, 315 U.S. 752 (1942), **"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."** *Jacob*, 315 U.S. at 752-753. **The district court's grant of summary judgment in this case failed to guard jealously Mr. Kampouris's statutory right to trial by jury under the ADA. See** 42 U.S.C. § 1981a."

The dissent also states: **"The First Congress's passage of the Seventh Amendment in 1789 and the 102nd Congress's passage of 42 U.S.C. § 1981a in 1991 reflect two centuries of deep and abiding faith in trial by jury. More than that, constitutional and statutory mandates for trial by jury reflect an immutable preference that certain matters, such as Mr. Kampouris's rights under the ADA, be left to the collective judgment of a jury of peers, rather than**

reposed in a single, albeit industrious and well-meaning, district court judge." "The federal courts' daily ritual of trial court grants and appellate court affirmances of summary judgment in employment discrimination cases across the land is **increasingly troubling to me.** I worry that the expanding use of summary judgment, particularly in federal employment discrimination litigation, raises the ominous specter of **serious erosion of the "fundamental and sacred" right of trial by jury."** See *Jacob*, 315 U.S. at 753."

In a dissenting opinion in the case of *Stafne v. Unicare Homes*, 266 F.3d 771 (2000), Judge Lay stated: "It is difficult for me to write this dissent because of the profound respect I have for my two learned colleagues. **However, unless appellate courts are willing to adhere to the actual evidence adduced at the trial, we abdicate our role as appellate judges for that of finders of fact.** We are bound by the record adduced at trial. We should not attempt to obviate the actual record by our own interpretive sense of right and wrong."

"It seems to me, once the plaintiff did put forth a submissible case and the defendant submitted it's defense, it should be left to the jury,.... to assess the credibility of the evidence and to follow the court's instructions by reason of the law given by the court. ... All judges are mandated by the Seventh Amendment to give overall deference to a jury verdict."

This is a case in which a railroad employer has cynically carried out a plan whereby they represented to a FELA court that an injured employee would be provided with a future accommodated job, effectively reducing their liability, then after terminating the employee the railroad represented to the ADA court that they could not accommodate in that same job.

II. THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT CERTIORARI TO EXPLORE THE APPLICATION OF THE DOCTRINE OF JUDICIAL ESTOPPEL AS TO THE SIGNIFICANCE OF REPRESENTATIONS MADE BY A PARTY DURING JUDICIAL PROCEEDINGS IN ORDER TO PRESERVE THE INTEGRITY OF THE JUDICIAL PROCESS.

APPLICATION OF ESTOPPEL

Respondent (Soo Line Railroad) previously represented to Petitioner (Pickens) that he would be allowed to continue to work in his position as a conductor in a part-time or reduced schedule accommodation. Soo Line did in fact allow Pickens to continue to work his conductor position in a part-time reduced schedule accommodation.

Pickens worked the "accommodation job" from November 1995 to March 1996 without complaint from Soo Line. There is no evidence that Pickens was warned or informed of any problem with the "accommodation job" or that it was unworkable in any way.

During the FELA trial, in March of 1996, Soo Line through their attorney and testimony of witnesses represented to the FELA Court, jury, and Pickens that the "accommodation job" would continue after the FELA trial.[20] See FELA TRIAL *supra.*

Pickens was allowed to continue to work the "accommodation job" without warning or complaint of any kind until August 16, 1996 when he was removed from service and the termination process began.

It is now known that the whole process of Soo Line allowing Pickens back to work, creating the "accommodation

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[20] This representation by Soo Line is now known to have been a lie because Soo Line witness Denny testified during the ADA trial that Soo Line company policy was to allow accommodation for injured employees prior to FELA settlement, but accommodation is not allowed after settlement of the FELA claim.

jobs", and representing to Pickens and the FELA Court that Pickens would be allowed to continue working the "accommodation job" for Soo Line was nothing more than a scam with the intended purpose of reducing the liability (damages) during Pickens' FELA trial.

In Pickens' subsequent ADA trial, due to rulings of the District Court, Soo Line was allowed to represent to the jury that they were totally unaware of any promise or representation of part-time accommodation. This allowed Soo line to lie at will. This statement was made by Soo Line attorney Kevin Driscoll to the jury; "Ladies and gentlemen, we think the evidence – **I believe the evidence shows that he withheld medical information from the Soo Line**, and when he did that, he deprived us of an opportunity to be able to evaluate the man properly and determine if there wasn't another accommodated position that we could put him in." Then in oral arguments to the Eighth Circuit Court Soo Line co-counsel Thomas Conley states; "....**the company knew well what his physical condition was** and continued to permit him to return to work and to work as he had been working, there was nothing new there." If Soo Line "knew well what Pickens' physical condition was", it is obvious that no medical information was being withheld.

The inconsistent positions that Soo Line has taken in the FELA trial and the ADA trial creates a classic prima facie case of estoppel. However, the District Court and the Appellate Court hold that the positions are not inconsistent. They do this by finding that the necessity of Pickens reduced schedule accommodation only became evident after the FELA trial, whereas prior to the FELA trial the accommodation was the "switchman" position and suggests that this was somehow a full time position. The District Court opinion and the majority opinion of the Appellate Court differ somewhat in their analysis on the estoppel issue. Under the District Court's analysis Soo Line was justified in representing that it could accommodate Pickens (Soo Line represented that they could accommodate a two

day per week reduced-schedule) because they believed that Pickens injuries were not severe enough to need a reduced-schedule accommodation. But, after the FELA trial and once Soo Line discovered Pickens actually did need the reduced schedule accommodation that it was not inconsistent then to represent that they could not accommodate him and bases this on the fact that this somehow conflicted with the Collective Bargaining Agreement.[21]

The Appellate Court majority opinion states that Pickens somehow represented in the FELA trial that he was totally disabled[22] and also states that Soo Line was justified in representing that they could accommodate Pickens with "alternative work assignment and schedule because his injuries were in fact less serious than he contended." If in fact Soo Line did actually believe that Pickens was not seriously injured, then why would they even suggest that they would accommodate Pickens with "alternative work assignment and schedule." The Majority then contends that the "accommodation job" was the switchman position that Soo Line had originally placed Pickens in which lasted only three days, was more physically demanding than his conductor position and which ultimately proved to be ineffective. Both the District Court and the majority opinion misstate the fact that Pickens' "accommodation job" was the reduced-schedule conductor position that Pickens worked both prior to and after the FELA trial. Both Courts appear to represent Pickens in a negative manner as being "unreasonable" and creating his own "self-dictated" work schedule. This depicts the Court's total lack of understanding of the facts of this case. Pickens cannot create his own work schedule. In order for Pickens to work and

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[21] When Soo Line represented in the FELA trial that they could accommodate Pickens reduced-schedule job, the Collective Bargaining Agreement was not an issue and in fact there is no conflict with the Collective Bargaining Agreement.

[22] Pickens has never contended to be totally disabled, but testified in the FELA trial that he could work his conductor position if accommodated in a two day per week reduced schedule. Pickens has never received "total disability" benefits nor has he been medically declared "totally disabled."

the only time "attendance is required" is when Soo Line calls Pickens to work. Pickens can remove his name from the board so that he is not subject to call. **All** conductors (whether disabled or not) are allowed to remove their names from the board ("lay off") when they prefer not to work. Any conductor can "lay off" because of sickness, injury, or any personal reason that the conductor deems necessary to be off work. **The Courts ruling suggests that Pickens should lose this "right" because of his disability as though there is nothing wrong with this type of discrimination.**

The fact is that Soo Line represented that they could and would accommodate Pickens future employment in the FELA trial and then represented in the ADA trial that they could not and would not accommodate, and that they actually had a company policy that prohibited accommodation after the FELA trial.[23]

The facts of this case clearly prove that Soo Line has engaged in a pattern of lies and deceit since Pickens was allowed to return to work. The Courts are simply ignoring these facts and actually siding with Soo line. **The District Courts analysis of what it calls "a different factual scenario"[24] has no factual support and belies any concept of logic or reasonableness.** The Court's reasoning is that Soo Line believed that Pickens was not seriously injured (then obviously would not need a two day per week accommodation), and thought they could accommodate Pickens (by representing that they would provide a two day per week reduced-schedule accommodation), but later when Soo Line found that Pickens needed the accommodation, it was then proper for Soo Line to represent that they could not accommodate Pickens and fire Pickens "due to his physical condition."

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[23] The evidence of Soo Line's policy disallowing accommodation after FELA settlement was not admitted into evidence.

[24] The "factual scenario" that the Court represents is completely manufactured, has no factual support, and was not argued by Soo Line.

This Court has previously invoked the doctrine of judicial estoppel from cases as far back as *Davis v. Wakelee*, 156 U.S. 680 and *Michels v. Olmstead*, 157 U.S. 198 to the more present case of *New Hampshire v. Maine*, 532 U.S. 742 (2001) . "Under the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." See *Davis* and *New Hampshire*. **"The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.** Courts have recognized that the circumstances under which judicial estoppel may appropriately be invoked are not reducible to any general formulation. Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, courts ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." See *New Hampshire*.

Soo Line has met all three of these prerequisites which clearly establish the circumstances in which the doctrine of judicial estoppel may be invoked.

Soo Line clearly represented in the FELA trial that they could and would accommodate Pickens with a two day per week reduced-schedule. Pickens accepted this representation because he wanted to continue his employment and receive his medical benefits and had no way to dispute the representation. It is undisputed that the

FELA verdict was a "compromise decision" (characterization of the District Court). When Soo Line counsel Conley was asked about the FELA verdict during oral arguments to the Eighth Circuit, he stated; "Well it contemplated that he would come back to work, which he did....." The FELA damages were clearly reduced due to Soo Lines representation of future accommodation, causing damage to Pickens. Soo Lines representation of future accommodation in the FELA trial was clearly intended to mislead the Court especially when notice is taken of their secret company policy prohibiting accommodation after FELA settlement and their representation that the Collective Bargaining Agreement conflicted with the accommodation in the ADA trial.

In the case of *Railroad Co. v. Howard,* 13 How. 307, in which a railroad falsely represented in a trial defending against an instrument that its seal was affixed to an instrument without authority and that it was not sealed or unsealed, evidence was held to be admissible to show that , in a former suit, the corporation had treated and relied upon the instrument as one bearing the corporate seal. The Court held; **"....and this brings the defendant within the principle of common law that when a party asserts what he knows is false, or does not know to be true, to another's loss, and to his own gain, he is guilty of a fraud, a fraud in fact, if he knows it to be false; a fraud in law, if he does not know it to be true.** ...We are clearly of opinion that the defendant cannot be heard to say that what was asserted on a former trial was false, even if the assertion was made by mistake. if it was a mistake (of which there is no evidence), it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it."

The doctrine of judicial estoppel should have been and still should be invoked against Soo Line. Soo Line Railroad should be estopped from arguing that Pickens is "not disabled", "not a qualified individual with a disability", "unable to perform the essential functions of the job with

accommodation", and that the "part-time or reduced-schedule accommodation is unreasonable." These issues were litigated and decided in the previous FELA trial, and Soo Line should not now be allowed to change their position on these issues.

SUMMARY

When Congress enacted The Americans With Disabilities Act, It was clear that their intent was to provide protection from discrimination for all "disabled" American citizens. The ADA was an "Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability." Congress found that; **43,000,000 Americans have one or more physical or mental disabilities,** discrimination against individuals with disabilities **continue to be a serious and pervasive social problem,** discrimination against individuals with disabilities persists in such critical areas as **employment,** individuals with disabilities have often had no **legal recourse**, and the result of unfair and unnecessary discrimination costs the United States billions of dollars in unnecessary expenses resulting from **dependency and nonproductivity.**

Congress clearly intended to provide "clear, strong, and consistent enforceable standards addressing discrimination against individuals with disabilities." In covering an estimated 43,000,000 or more people, Congress surely intended a broad coverage and interpretation of the ADA.[25]

However, for unexplained reasons most judicial districts have a very negative view of individuals with disabilities and the ADA. There are no clear or consistent standards in our judicial system addressing disability discrimination particularly, employment discrimination.

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[25] Surely Congress did not enact the ADA to provide employers with guidelines on how to rid themselves of unwanted impaired workers.

Individuals with disabilities, who are victims of employment discrimination, often seek the "legal recourse" that was thought to have been provided by the ADA, only to find an unprecedented high standard of proof just to survive summary judgment. Not only are the employee's civil rights violated by his employer, but then the judicial system fails to provide the protections enacted by Congress and the employee then loses his Seventh Amendment rights as well.

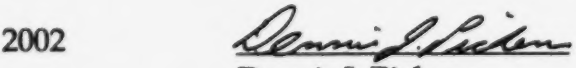
The issue of the "basic and fundamental" rights of a jury trial protected by the Seventh Amendment and described by this Court as "sacred" were addressed by Judge Bennett and Judge Lay. When members of the Court show a concern and are "troubled" by an obvious systemwide disregard for fundamental rights, scrutiny by this Court is surely justified. **What could be of greater significance to this Court than the protection of the "basic and fundamental" civil rights of American citizens.**

CONCLUSION

Guidance should be given the district courts as to the standard of proof and the standard of review regarding ADA cases, with a direction toward a doctrine of deference to jury decisions

In view of Congress's clear intent in enacting the ADA and the district courts' and appellate courts' recent history of inconsistency in ruling on ADA cases, review by this Court is warranted and certiorari should be granted.

DATED: March 18, 2002



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IN THE

Supreme Court of the United States

Dennis J. Pickens,

Petitioner,

v.

Soo Line Railroad Company,
d/b/a C.P. Rail Systems,

Respondent.

APPENDIX "A"

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Acting pro se

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-1497

Dennis J. Pickens,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	Appeal from the United
Soo Line Railroad Company,	*	States Court for the
doing business as C.P. Rail	*	Southern District of
Systems,	*	Iowa
	*	
Appellee.	*	
	*	

Submitted: January 8, 2001
Filed: August 30, 2001

Before HANSEN and HEANEY, Circuit Judges, and WEBBER,[1] District Judge.

HANSEN, Circuit Judge.

Dennis Pickens appeals the district court's[2] grant of judgment as a matter of law in favor of his former employer, Soo Line Railroad (Soo Line), after a jury found in

1The Honorable E. Richard Webber, United States District Judge for the Eastern District of Missouri, sitting by designation.
2The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

his favor in this employment discrimination case. Pickens contends Soo Line terminated his employment in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101-12213 (1994), and the Iowa Civil Rights Act (ICRA), Iowa Code § 216.1-216.20 (1999), after he suffered a back injury. Pickens further asserts the district court erred by submitting only the ADA claim to the jury and by excluding all evidence related to Pickens' prior Federal Employees Liability Act (FELA) trial. We affirm.

I.

The Soo Line and its predecessors employed Pickens from 1973 until August 16, 1996, primarily as a railroad conductor. On October 14, 1992, Pickens was injured when a train's braking system malfunctioned. He sustained a herniated disc in his lower back. As a result of this injury and after an unsuccessful five-month trial work period, Pickens was unable to continue working for three years. During this extended period of not being able to work, Pickens received Railroad Retirement Board disability benefits. Pickens returned to work in October 1995, but because of medical restrictions limiting his work time to no more than an eight-hour day, he was unable to resume his duties as a conductor. Soo Line offered Pickens a switchman's position to accommodate his medical limitations. Pickens worked as a switchman for three days before concluding the job was too strenuous and refusing to continue working in the position. Because Pickens wished to return to his "road" position as a conductor, he requested that his physician lift his medical restriction to allow for a twelve-hour work day, four days per week--the schedule that the job required. Two months after returning to his duties as a full-time conductor, Pickens found that working four days per week was too strenuous, and he sought another medical restriction. Pickens' physician refused to

comply with his request. Consequently, Pickens regularly made himself unavailable for work by exercising his right to "lay off" under the railroad's collective bargaining agreement.[3]

After he chose to lay off in the spring of 1996, Soo Line required Pickens to obtain a medical status report from his physician prior to returning to work. This was the railroad's policy; however, it was the first time Soo Line had required Pickens to procure a release. One of the questions included in the release asked Pickens' physician whether he was able to return to full-time duty. Although his physician determined Pickens to be incapable of full-time employment, Pickens requested that his physician falsify his condition by answering affirmatively. His physician acquiesced to Pickens' deception of the railroad.

Pickens continued his cyclical pattern of routinely laying off, obtaining a medical release, and returning to work when he chose. While waiting for clearance to return to work after a layoff in August 1996, Pickens wrote a letter to Soo Line's claims representative with copies sent to Soo Line's president and chief medical officer, expressing his frustration. He wrote in part: "I had my medical restrictions removed to get back to work before and I will do it again if this is required. I will totally disregard safety and common sense if this is required." (District Ct. Order at 6.) Concerned both with the possibility that Pickens might act on his threat and that Pickens had misrepresented the status of his health, Soo Line held a hearing pursuant to the collective bargaining

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3The railroad allocates conductors to job assignments based upon a list of employees ranked by seniority. Under the collective bargaining agreement, each employee may withdraw his name from the list or "lay off" if he chooses to use vacation, sick leave, or personal time. (Trial Tr. at 290.)

agreement and subsequently terminated him on August 16, 1996.

Litigation between the parties began when Pickens sued Soo Line alleging claims under FELA, stemming from his October 1992 back injury. In that litigation,

Pickens asserted his back injury forever precluded his return to work. At a trial held in March 1996, the jury found in Pickens ' favor and awarded him $50,000 in past and future pain and suffering, $65,188 in past earnings, $230,000 present value of lost future earnings, and $20,000 in disability damages. After his August 16, 1996, firing, Pickens filed the present suit, alleging that Soo Line had terminated him in violation of the ADA and the ICRA. He also asserted several contract and estoppel claims. Only the ADA issue was submitted to the jury, while the contract and estoppel claims were resolved through a contemporaneous bench trial.

Following the four-day jury trial, the jury found Soo Line's conduct violated the ADA and awarded Pickens $95,867.15 in past lost wages and benefits and $525,000 in past mental pain and suffering. At a hearing the day following the verdict, the district court reduced the past pain and suffering damages to $300,000 in order to comply with the statutory damages cap contained within the ADA. Soo Line then moved for judgment as a matter of law or alternatively for a new trial on all issues. The district court granted Soo Line's Rule 50(b) motion, finding as a matter of law that Pickens was not a person with a qualified disability and that at the time Soo Line fired him, he was neither willing nor able to perform the essential functions of his job, with or without accommodation. The district court further concluded that the estoppel claims failed because Pickens did not prove that Soo Line changed its position between the two trials to his detriment. Pickens now appeals.

II.

We review the district court's grant of judgment as a matter of law de novo. See Otting v. J.C. Penney Co., 223 F.3d 704, 711 (8th Cir. 2000). "[A] court should render judgment as a matter of law when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2109 (2000) (internal quotations omitted). In making our determination, we, like the district court, will view all the facts in the light most favorable to the nonmoving party and must refuse to make credibility determinations or weigh the evidence. Id. at 2110; Phillips v. Union Pac. R.R., 216 F.3d 703, 706 (8th Cir. 2000).

When there is no direct evidence of discrimination, discrimination claims are analyzed under the burden-shifting method of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Thus, Pickens has the initial burden of establishing a prima facie case of discrimination; if Soo Line offers a legitimate, nondiscriminatory explanation for Pickens' discharge, then he must show that the explanation is merely a pretext for discriminatory animus. See id. at 803-04; see also Tatom v. Georgia-Pacific Corp., 228 F.3d 926, 931-32 (8th Cir. 2000) (applying burden-shifting analysis set forth in McDonnell Douglas and reversing the district court's denial of a motion for judgment as a matter of law). Because this case was fully tried on the merits, "[w]e need not review the adequacy of the evidence at each stage of the McDonnell Douglas analysis; rather, our review concentrates on whether the record supports the ultimate finding of discrimination." Cardenas v. AT & T, Corp., Nos. 00-1915, 00-2353, 2001 WL 322156 (8th Cir. Apr. 4, 2001) (internal quotations omitted).

In order to make a case of discriminatory discharge under the ADA, Pickens must prove that (1) he is disabled within the meaning of the statute; (2) he is a qualified individual; and (3) that he was terminated because of his disability. See Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1135 (8th Cir.), cert. denied, 528 U.S. 818 (1999). A qualified individual is one who is able to perform, with or without accommodation, "the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Pickens asserts that he is qualified to perform the essential functions of his job regardless of his excessive absences given the nature of the railroad's scheduling structure. Pickens contends that because the railroad allows an employee to "lay off" of working any day of his choosing, this procedure makes his use of the practice a nonissue. We disagree. This court has consistently held that "'regular and reliable attendance is a necessary element of most jobs.'" Greer v. Emerson Elec. Co., 185 F.3d 917, 921 (8th Cir. 1999) (quoting Nesser v. Trans World Airlines, Inc., 160 F.3d 442, 445 (8th Cir. 1998)); see Moore v. Payless Shoe Source, Inc., 187 F.3d 845, 848 (8th Cir.), cert. denied, 528 U.S. 1050 (1999). Even though the railroad's system of scheduling appears quite flexible, the railroad's policy requires regular, reliable attendance, and Pickens' conductor's job was full-time. Pickens' choice to lay off twenty-nine times from October 1995 to August 1996 is excessive and eviscerates any regularity in his attendance. "An employee who is unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job in question, much less the essential ones." Moore, 187 F.3d at 848 (internal quotations omitted) (alteration in original).

Pickens' case is similar to Buckles v. First Data Res., Inc., 176 F.3d 1098 (8th Cir. 1999). In Buckles, a panel of this court reversed the district court's denial of judgment as a matter of law and remanded for entry of judgment in favor of the employer when an employee with acute sinusitis was

chronically absent from his job. Id. at 1102. The employee contended that he was qualified to perform his duties with the accommodation of leaving work any time an air-borne irritant aggravated his condition. Id. at 1101. Our court disagreed, reasoning that "[u]nfettered ability to leave work at any time is certainly not a reasonable accommodation," and an employer is not required by the ADA to provide an unlimited absentee policy. Id. The ADA does cite a part-time or modified work schedule as a reasonable means of accommodation, see 42 U.S.C. § 12111(9)(B), but we view Pickens' suggested method--that he should be able to work only when he feels like working--as unreasonable as a matter of law. Soo Line accommodated Pickens by assigning him to do the switchman's job where he could work within his medical restrictions for two days per week but be paid for a full five-day work week. This effort proved unsuccessful when Pickens refused to perform as a switchman after only three days on duty. Additionally, he had his physician falsify that he was able to perform fulltime work because he did not want to be limited to the part-time list of conductors.

Furthermore, as the district court noted, when Pickens applied for disability benefits from the Railroad Retirement Board after Soo Line terminated him, he asserted under penalty of perjury that, as of August 1996, he was completely unable to work in the railroad industry because of his disability. Although Supreme Court precedent mandates that Pickens' admission of a total inability to work is not wholly inconsistent with inclusion under the ADA, this is true only if a reasonable juror could conclude he could perform the essential elements of his job with or without a reasonable accommodation. Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 807 (1999). Our review of the record convinces us that as a matter of law, no reasonable juror could find Pickens to be a qualified individual because he

was unable to perform the essential duties of his job with or without a reasonable accommodation.

Moreover, even assuming Pickens established that he was qualified, Soo Line offered a nondiscriminatory reason for Pickens' termination. See Reeves, 120 S. Ct. at 2109 ("[A]n employer [is] entitled to judgment as a matter of law if the record conclusively reveal[s] some other, nondiscriminatory reason for the employment decision . . . ."). It is uncontested that Pickens admitted to sending a letter threatening to have his medical restrictions removed, as he had done before, and disregard "safety and common sense if this [was] required" in order to return to work with a more favorable work schedule. (Trial Tr. at 220.) Soo Line maintains that it terminated Pickens both as a result of this letter and for falsifying his medical status. Pickens argues that this letter is "not at all threatening" and is tempered by the use of the phrase "if required." (Appellant's Br. at 32-33.) Taking into account Pickens' position as a conductor, which brings with it the responsibility of moving trains and the possibility of catastrophic injury, certainly an express threat to disregard the safety of others in order to be employable is a legitimate, nondiscriminatory reason for discharging an employee. See, e.g., Clark v. Runyon, 218 F.3d 915, 919 (8th Cir. 2000) (finding actual violence and threats of violence nonpretextual reasons for terminating an employee); Phillips, 216 F.3d at 706 (threatening a coworker with bodily harm was nondiscriminatory reason for suspension); Williams v. Widnall, 79 F.3d 1003, 1007 (10th Cir. 1996) (concluding employee was terminated not because of disability, but because he "made threats against his supervisor and co-workers"). Furthermore, a careful review of the record supports the district court's conclusion that the reasons provided by the railroad for his termination were nonpretextual.

We conclude that Pickens failed to set forth sufficient evidence for a jury to reasonably find that he was able to perform his railroad duties with or without accommodation. Moreover, Soo Line presented conclusive, legally ample, and nonpretextual reasons for terminating Pickens wholly unrelated to his impairment. The district court's entry of judgment as a matter of law was correct.

Pickens also asserts that the district court's refusal to submit only the ADA claim to the jury warrants reversal. The district court excluded the ICRA claim stating Pickens' success or failure "stands on the federal disability claim." (Trial Tr. at 338.) Soo Line's contention that the Iowa courts do not allow jury trials of ICRA claims is correct. Smith v. ADM Feed Corp., 456 N.W.2d 378, 380 (Iowa 1990) (en banc). "However, the right to a jury trial in federal court is a question of federal law, even when the federal court is enforcing state-created rights and obligations . . . even when a state statute or state constitution would preclude jury trial in state court." Gipson v. KAS Snacktime Co., 83 F.3d 225, 230 (8th Cir. 1996). We disagree with the district court's failure to submit the ICRA claim to the jury, but because we find judgment as a matter of law was appropriate as to the ADA claim, this error is harmless. See, e.g., Berg v. Norand Corp., 169 F.3d 1140, 1144 & n.5 (8th Cir. 1999) (resolving ADA claim simultaneously disposes of state-law discrimination claim); Vincent v. Four M Paper Corp., 589 N.W.2d 55, 59-60 (Iowa 1999) (recognizing similarities between the ADA and ICRA and noting the incorporation of federal definitions into the Iowa statute).

Pickens next contends that the district court erred by rejecting his judicial estoppel claim. He argues that Soo Line's attorney at the FELA trial made statements during his closing argument conveying Soo Line's willingness to accommodate him, and therefore, Soo Line is judicially estopped from denying these statements at the subsequent

trial. "[J]udicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation"; the purpose of which "is to protect the integrity of the judicial process." Hossaini v. W. Mo. Med. Ctr., 140 F.3d 1140, 1142-43 (8th Cir. 1998) (internal quotations omitted).

During the FELA trial, Pickens claimed he was totally disabled because of his back injury. Soo Line addressed Pickens' contention by stating it could accommodate him with an alternative work assignment and schedule because his injuries were in fact less serious than he contended. In comparison, at the later ADA trial, Soo Line argued that regular attendance at work is an essential function of Pickens' full-time conductor position and that repeated laying off for an old injury was not a viable accommodation when his physician had certified him fit to perform full-time work as a conductor. In the first instance, Soo Line believed it could accommodate Pickens, and it tried to do so by offering him the switchman position. However, subsequent to the FELA trial, it became evident that the only accommodation Pickens was willing to accept was an unreasonable, self-created and self-dictated, work schedule. Because Soo Line's positions are not inherently inconsistent, judicial estoppel is inapplicable.

Finally, Pickens challenges the district court's refusal to allow evidence referencing the prior FELA trial. The court reviews the district court's evidentiary rulings for an abuse of discretion. Allen v. Entergy Corp., 193 F.3d 1010, 1015 (8th Cir. 1999). We cannot agree that Pickens was prejudiced by withholding this evidence because the jury found in his favor without its admission. The district court did allow Pickens to use some of the evidence from the prior trial for impeachment purposes, but it significantly limited the scope of this evidence. The district court's limitation was not an abuse of discretion.

III.

Consequently, the judgment of the district court is affirmed.

HEANEY, Circuit Judge, dissenting.

After a careful review of the record, I am convinced that this case was properly submitted to the jury. The record reveals that many of the facts as recited by the majority were contested at trial and, indeed, remain disputed on appeal. Given these differing versions of the facts, as set out below, I do not believe that the district court should have substituted its judgment in place of the jury's. I therefore respectfully dissent.

In evaluating the district court's decision on a judgment notwithstanding the verdict, we must:

> 1) consider the evidence in the light most favorable to [Pickens], who prevailed with the jury; 2) assume that all conflicts in the evidence were resolved by the jury in [Pickens'] favor; 3) assume as proved all facts which [Pickens'] evidence tends to prove; 4) give [Pickens] the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and 5) affirm the denial of the motion if reasonable persons could differ as to the conclusions to be drawn from it.

Morgan v. Arkansas Gazette, 897 F.2d 945, 948 (8th Cir. 1990)(internal quotation omitted). The majority, however, recites a version of the facts closely mirroring those set forth in Soo Line's brief, rather than those facts that tend to prove Pickens' case.

If considered in the light most favorable to Pickens, the record reveals the following facts. Pickens had worked as a railroad conductor for the Soo Line for over 20 years. During that period he never had any safety or disciplinary problems. In 1992, when a train's brakes malfunctioned, Pickens sustained a back injury.

After the injury, Pickens was off work for three years. In October 1995, Soo Line brought Pickens back as a switchman, ostensibly because that position would be compatible with his medical restrictions limiting his lifting and working hours. The switchman position, however, required heavy lifting, which caused Pickens pain and would have exacerbated his disability. Pickens talked with his doctor regarding a return to the conductor position, which was less physically strenuous than the switchman position. Shortly thereafter, his doctor approved the change to the conductor position, contingent upon Pickens' ability to tolerate back pain.

Pickens then returned to work as a conductor, and he maintained a fairly consistent work schedule of two to three days a week. When his back flared up, he would "lay off" from the board, which meant that he was not available for call that day. Conductors at the Soo Line do not typically work a regular schedule. Rather, the "board" system is similar to the staffing at a temporary agency. Even if a conductor is available for service and is marked up on the board, there may not be a train available to run, in which event the conductor would be paid only a reduced rate. If the employee decided to "lay off" by taking his or her name off the board, the employee would not be called that day. A "lay off" could be charged as a sick day, personal leave day, or could be taken as time without pay. Indeed, evidence at trial established that Pickens had averaged only between

three and four days of work per week before his injury had occurred. Soo Line did not submit any evidence that Pickens' flexible schedule after his injury created any expense or inconvenience to the company, given the way in which the board system worked.

Pickens maintained this flexible schedule without incident for a number of months. In March 1996, a trial was held on Pickens' FELA claim stemming from his back injury. Soo Line's attorney argued to the jury that the damages for the injury should be reduced because:

> [The b]ottom line is Mr. Pickens is still our employee. He's working. When this case is over, he'll still be working, he'll still be our employee. If he wants to work five days a week, he's got our okay to work five days a week. If he wants to work two days a week, he's got our okay to work two days a week.

(Appellant's Add.). Undoubtedly, this promise of accommodation had an influence on the jury at the FELA trial. Believing that the railroad would work with Pickens to keep him on the job, on a part-time basis if required, the jury would have been influenced to award Pickens less money than if they had known that he would not be granted any accommodations, and, indeed, be fired from his position.

Following the FELA trial, the railroad stopped accommodating his injury. When his back flared up on May 27 and Pickens called in to "lay off," Soo Line suspended him for fourteen days and required Pickens to obtain a health status report from his doctor. Further, at this point, his supervisor harassed Pickens by telling him that "[i]f [he] couldn't work any more than two to three days a week that [he] shouldn't have been allowed to return to work and that [he] should quit." (Tr. Vol. I at 99). After Pickens' back flared

up, and he called in to "lay off" on August 16, 1996, Soo Line again demanded medical documentation of his condition. For weeks afterward Soo Line did not notify Pickens whether he had been approved to return to duty.

Frustrated at not hearing anything from Soo Line regarding his work status, Pickens wrote the letter of September 6, 1996. The majority places a great deal of emphasis on a portion of the letter, stating that the letter appeared threatening and was, therefore, a non-discriminatory reason for Pickens' termination. When considered in its entirety, however, the letter is susceptible to differing interpretations. Pickens was expressing anger and frustration, but opinions could certainly differ as to whether the contents of the letter constituted a threat. Pickens began the letter by inquiring about his status, stating that his understanding from the FELA trial was that he could work part-time, as necessitated by his back injury. He documented the harassment by his supervisor and expressed his confusion as to why he was being prevented from working. The last part of a letter, where he mentions the disregard of safety "if required" (Appellant's Add.) also could have a meaning other than the one given to it by the majority. Pickens explained at the trial that he meant that by requiring him to work when his back hurt, the Soo Line could be putting his safety at risk. This interpretation fits with the protests present throughout the rest of the letter. In any event, the letter was introduced into evidence at trial, and the jury was free to draw its own conclusions about its meaning.

There was also evidence that the reasons Soo Line provided for terminating Pickens were pretextual. The first reason Soo Line gave for the termination of Pickens was the letter, which has already been discussed, ante. The second reason Soo Line gave was that Pickens had been laying off under false pretenses. At trial there was no evidence that Pickens had ever falsified an injury or that he had been

malingering in any way. Rather, the Soo Line superintendent who investigated the situation based his findings on the lack of any record in Pickens' file documenting an injury (despite the Soo Line's payment of damages to Pickens for his back injury in the FELA trial).

The facts as I have set them out provide sufficient evidence for the jury to find that Soo Line discriminated against Pickens because of his disability. The jury could have found that Pickens was qualified to perform the essential functions of the job with the accommodations Soo Line had provided prior to the FELA trial. Given the "board" and the "layoff" system, the jury could have concluded that a flexible schedule was a reasonable accommodation, especially because Soo Line never introduced any evidence that such a schedule would be a financial hardship. As reasonable people could disagree with the facts and whether discrimination had taken place, the case was properly submitted to the jury.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-1497	x	
	x	
Dennis J. Pickens,	x	
	x	
Appellant,	x	
	x	Order Denying
vs.	x	Petition for
Soo Line Railroad	x	Rehearing and for
Company,	x	Rehearing En Banc
doing business as	x	
C.P. Rail Systems,	x	
	x	
Appellee.		

The petition for the rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge McMillian would grant the petition.

(5128-010199)

December 19, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

FILED
DES MOINES, IA
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DENNIS J. PICKENS, Plaintiff, vs. SOO LINE RAILROAD COMPANY, Defendant,	)	NO. 4-97-CV-80409 RULINGS ON POST-JUDGMENT MOTIONS, FINDINGS ON BENCH TRIAL ISSUES, AND ORDER FOR JUDGMENT FOR DEFENDANT

This lawsuit is the second chapter of litigation between the plaintiff Dennis J. Pickens [Pickens) and the defendant Soo Line Railroad Company [Railroad], his former employer. In the first lawsuit, based on FELA claims, a jury returned a verdict requiring the Railroad to pay damages for a back injury Pickens sustained on October 14,1992, while working for the Railroad as a conductor. The verdict allowed him to recover $50,000 past and future pain and suffering, $65,188 past earnings, $230,000 present value of lost future earnings, and $20,000 in disability, including loss of function, together totaling $365,188. In that lawsuit, the parties disputed whether Pickens would be able to return to work; Pickens claimed he would never be able to return to work while the Railroad contended it would provide him accommodation to work at positions that would not further injure his back.

Pickens returned to work after the trial, working reduced hours in various assigned positions that amounted to fewer hours and different tasks than he had previously performed.

On October 4, 1996, the Railroad terminated Pickens, informing him that he had laid off under false pretenses and threatened the safety of his co-employees and the general public by falsifying his medical condition, in violation of the Railroad's operating rules. Pickens contends those reasons were pre textual and he was terminated because of his disability.

In this second-chapter lawsuit, Pickens has pleaded theories that include violation of the Americans With Disabilities Act, violation of the Iowa Civil Rights Act, breach of express and implied contract, and equitable or judicial estoppel. The Railroad has vigorously denied all pleaded theories for recovery of damages, seeking to uphold as genuine its stated reasons for terminating Pickens.

On January 27, 1999, the court denied the parties' cross- motions for summary judgment, deciding the federal and Iowa disability discrimination claim should be resubmitted to a jury, and Pickens' contract claims and judicial estoppel theories would best be resolved as equitable issues in a bench trial based on a plenary trial record. The court presided at a four-day jury trial on June 14-17, 1999; while the jury was deliberating, the court received additional evidence in completing the bench trial on non- jury issues.

The jury returned verdicts finding that the Railroad had unlawfully discriminated against Pickens on the basis of his disability. The jury found Pickens sustained damages proximately caused by unlawful discrimination, and its damages special verdicts were $95,867.15 in past lost wages and benefits and $525,000 in past mental pain and suffering. The day after the verdicts were returned, the court held a hearing on what judgment should be entered, then entered judgment for Pickens in the amount of $95,867.15 for lost wages, but the reduced sum of $300,000 for past pain and suffering.

On July 14, the court held a hearing on the parties' numerous post-judgment motions and allowed final briefs to be filed

by August 2. Last month the court again permitted counsel to file supplemental briefs.

I regret the lengthy delay between the presentation of oral arguments on post-trial motions and this decision. Counsel have presented extensive detailed briefs and other papers to support or resist each of their motions.

The court now grants the Railroad's motion for judgment as a matter of law and directs the clerk of court to enter judgment for defendant on all claims, including the bench trial issues.[1]

I. Railroad's Motion for Judgment Notwithstanding the Verdict.

Pickens is entitled to judgment against the Railroad unless as a matter of law he failed to establish one or more of the elements of each of his claims. The court views the evidence in the light most favorable to Pickens in determining whether evidence supports the jury's verdict that found Pickens had proved his disability discrimination claim. Karchar v. Emerson Elec. Co., 94 F.3d 502, 507 (8th Cir. 1996).

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[1] Because final judgment is entered for the Railroad, the court need not and does not address Pickens' motions for reinstatement to employment position, reinstatement of full damages, request for front pay, request to receive disability benefits, contention that the statutory ceiling on damages is unconstitutional, and request for attorney fees and costs. Neither does the court address the Railroad's alternative motions for credit to be applied to any front and back pay awards.

On the first element of his claim of disability discrimination, the court finds as a matter of law that Pickens did not have a qualified disability. At the time he was terminated, he was neither able nor willing to perform the essential functions of his job, with or without accommodation. From the time Pickens returned to work for the Railroad after the first jury trial, the Railroad attempted to accommodate him by assigning him shorter hours of work and less strenuous physical tasks. But his level of attendance was neither regular nor reliable. Frequently he refused to work the hours he was assigned to work. He knew the Railroad required regular, reliable attendance. This undisputed Railroad policy was reasonable and consistent with the language of its Collective Bargaining Agreement with the United Transportation Union that represented Pickens. Nesser v. Transworld Airlines. , 160 F.3d 442, 445 (8th Cir. 1998) (attendance at work is a necessary job function); Buckles.v. First Data Resources. Inc., 176 F.3d 1098.. 1102 (8th Cir. 1999) (plaintiff who had numerous and unpredictable absences not "qualified under ADA) .

Pickens argues he had for many years been a qualified, satisfactory employee. Past performance alone, however, is insufficient if present performance is plainly inadequate. Browning v. Libertv Mut. Ins. Co., 178 F.3d 1043, 1048 (8th Cir. 1999) (plaintiff not "qualified" despite past performance, when ability had diminished or deteriorated).

It is noteworthy that in his application for disability payments from the Railroad Retirement Board (Exhibit 30), Pickens stated he could not work as of August 16, 1996, and described in detail why his condition prevented him from performing railroad work. In response, the Railroad Retirement Board granted his request for a railroad retirement disability annuity effective August 17, 1996. This, too, supports the court's conclusion that Pickens failed to

establish he was a qualified individual with a disability, the first element of his disability discrimination claim. Moore v. Payless Shoe Source.. Inc., 139 F.2d 1210, 1212-13 (8th Cir. 1998) (prior representation of disability strong evidence plaintiff unqualified" in subsequent ADA suit).

The Collective Bargaining Agreement complicated the Railroad's ability to accommodate Pickens in performing restricted, limited-duty work. The Railroad had no obligation to violate the Collective Bargaining Agreement to accommodate him. Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995) (employer not obligated to make accommodations that violate the rights of other employees).Neither that Agreement nor Federal law required the Railroad to hire additional employees to help operate trains on the days when Pickens decided he would not or could not come to work.

Most importantly, Pickens also failed to establish that he was terminated by reason of his disability. As a matter of law, the reasons given by the Railroad for terminating him were not pretextual. Without question, the job of conductor was important for the safety of other employees and the public, as well as the equipment. It is undisputed that Pickens, dissatisfied with his hours and type of employment, wrote and sent to the Railroad Exhibit CC, the letter on which the Railroad primarily based his termination. He wrote:

I had my medical restrictions removed to get back to work before and I will do it again if this is required. I will totally disregard safety and common sense if this is required. I will not quit as Mr. Carlson [trainmaster] has suggested. My family deserves better.

The circumstances of this letter are important. Pickens was protesting a schedule of work, made to accommodate him, that ; resulted in a work schedule he disapproved. He had been protesting his limited hours of work and work assignments. He had even told his treating physician to

conceal some of his medical restrictions from the Railroad so he could receive assignments more acceptable to him.

While deliberating, the jurors inquired about this letter, wondering why it was not in evidence with other exhibits in the jury room.[2] I conclude the jury could not reasonably find Pickens' discharge pretextual in the face of that letter Pickens sent to the Railroad just before it terminated him. As a matter of law, the Railroad was justified in terminating Pickens because he asked his treating physician' to conceal some of his work restrictions and threatened to "totally disregard safety."

The Railroad did not summarily terminate Pickens. Its authorized personnel, in compliance with its policies and Collective Bargaining Agreement with the Union, conducted an investigation and held a hearing before terminating him.

In explaining why he sent the letter (Exhibit CC), Pickens acknowledged he was concerned he should not work when his conditions would make for "an unsafe situation." This, too, established he was not a qualified person with a disability, one element of his federal and state disability discrimination claim. No reasonable jury could conclude from this trial record that Pickens was fit to remain as a Railroad employee when he was terminated. Pickens presented no competent evidence that the Railroad personnel had been motivated to terminate Pickens for any other reason. See Kiel v. Select Artificials. Inc., 169 F.3d 1131, 1135 (8th Cir. 1999) (plaintiff's ADA claim failed because he submitted no evidence of pretext).

[2] The letter, Exhibit CC, was not received in evidence because part of the letter referred to a matter precluded by a motion in limine. The court did provide the jury, in answer to its handwritten question, a redacted copy of the letter.

The court grants the Railroad's motion for judgment notwithstanding the verdict.

II. Bench Trial Findings and Conclusions.

A. Contract Claims. During chapter one of this litigation, the FELA lawsuit, Pickens and the attorney who was then representing him at trial vigorously contended he was totally disabled from employment because of his back injuries. The Railroad and its trial counsel responded, with equally vigorous closing argument, that Pickens would be able to return to work because his injuries were not as serious as he claimed and the Railroad would find work to accommodate his injuries.

Pickens alleges in this second lawsuit that the Railroad's trial counsel thereby made a binding promise to allow him to return to work. This alleged agreement was not an enforceable express or implied agreement.

The statements of his own attorney and Railroad counsel were made entirely in the context of litigation of the FELA claim. The Railroad knew, and Pickens should reasonably have understood, that no express or implied meeting of the minds occurred during that trial. The alleged promises were too vague and indefinite to be enforced. Burlington N. R.R. v. Judds Bros. Constr. Co., 184 F.3d 743 (8th Cir. 1999). Moreover, the Railroad's alleged promise would have conflicted with its duties under its Collective Bargaining Agreement with the United Transportation Workers Union that has represented Pickens throughout his employment as a Railroad employee.

Pickens has failed to prove by a preponderance of the evidence that the Railroad violated either an express or an implied contract to employ him on terms different from the terms of the Collective Bargaining Agreements the Railroad had entered into with the Union representing Pickens.

B. Pickens' Estoppel Claims. To prove estoppel under applicable Iowa law, a plaintiff must prove justifiable reliance on the defendant's representation or concealment of material facts. Bruns v. Hartford Accident & Indem. Co, 407 N.W.2d 576, 580 (Iowa 1987). Pickens bases his estoppel claims here on statements made during closing argument by Railroad counsel in the FELA lawsuit, describing this as judicial estoppel, a form of equitable estoppel. In general terms, equitable estoppel prevents a party from denying facts previously asserted as true when the other party has relied on those representations to its detriment. Totaling Petroleum Inc. v. Davis, 822 F.2d 734,737 (8th Cir. 1987). Judicial estoppel prevents a party from taking a position in one judicial or quasi-judicial proceeding and then taking a contrary position in a latter related proceeding. Moore v. Payless Shoe Source Inc., 139 F.3d 1210, 1212 (8th Cir. 1998) (judicial estoppel a "seldom-invoked doctrine" protecting judicial process from allowing claimant to change position from previous testimony under oath)..

Pickens has failed to prove that the Railroad, through its attorney representing the Railroad or any other authorized person, represented facts or took a position in a legal proceeding that it later changed to the detriment of Pickens.

First, the Railroad was justified in arguing it would be able to accommodate him, based on its theory that Pickens injuries were not as severe as he claimed in the FELA lawsuit. When Pickens received a verdict that suggested he had some disability but not the total disability he claimed, the Railroad was justified in finding work assignments for him and attempting to accommodate him, consistent - with the requirements of its Collective Bargaining Agreement. When the Railroad terminated Pickens, it was not because it changed its mind about accommodating him. The Railroad terminated Pickens for the reasons this court has found as a matter of law justified

termination, reasons that did not constitute discrimination against him because of his disability. Railroad counsel's closing argument in the FELA trial concerned a different factual scenario from the circumstances that led to the Railroad terminating Pickens. In the FELA trial, the Railroad believed it could re-employ Pickens, based on evidence it presented that his injuries and disability were slight. The Railroad terminated Pickens based on facts quite different from those presented at the FELA trial. Pickens was terminated because of his physical condition and attitude in October of 1996, not because of his physical condition at the time ,of the FELA trial. The facts in this case simply stop far short of proving Pickens' judicial estoppel claim.

Moreover, Pickens has not established that he reasonably relied on any representation during the FELA lawsuit and trial to believe he had a right to permanent employment with the Railroad. No reasonable plaintiff in a lawsuit, such as Pickens in his FELA lawsuit, would consider statements made by the attorney downplaying physical injuries as amounting to an oral employment agreement contrary to the terms of the Collective Bargaining Agreement the employees' Union had negotiated.

Finally, the jury verdict in the first jury trial apparently was a compromise decision, with counsel for Pickens seeking more than $1,000,000 in damages and the Railroad contending the recovery should be much less than the jury awarded. No statement made by the Railroad' attorney defending that lawsuit constituted a promise or representation adequate to support theories of promissory estoppel, equitable estoppel, breach of implied or express contract, or any type of judicial estoppel.

IV, Conclusion,

On complete and final review of this extensive record, the court concludes that Pickens has not sustained his burden of proof on any of his theories for recovery, With hindsight, the court perhaps should have granted summary judgment for defendant on a rather large summary judgment record. The court then found and still believes the summary judgment record disclosed genuine issues of fact on estoppel issues. .

Because Pickens has not sustained his burden to show that a reasonable jury could find the Railroad liable on any of Pickens' theories for recovery, the court directs the clerk of court to enter judgment as a matter of law for the defendant Soo Line Railroad Company d/b/a CP Rail System and against the plaintiff Dennis J. Pickens, at plaintiff's cost.

IT IS SO ORDERED. -

Dated this 14th day of January, 2000

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

Circuit by Circuit Outcomes in ADA Employment Discrimination Cases July 1992 - July 1998

Circuit	No. of Cases	Defendant Prevailed Below on ADA issues	Defendant Prevailed on Appeal	Plaintiff Prevailed Below	Plaintiff Prevailed on Appeal
First	16	14	9	2	2
Second	27	26	15	1	1 (but award substantially reduced)
Third	13	13	9	0	0
Fourth	70	66	65	4	2
Fifth	30	25	23	5	1 (but award substantially reduced)
Sixth	63	62	56	1	0
Seventh	67	65	49	2	2
Eighth	45	40	35	5	3 (but award substantially reduced in one case); (rehearing en banc scheduled for one additional case)
Ninth	61	58	47	3	1(but award substantially reduced)
Tenth	50	50	49	0	0
Eleventh	23	20	13	3	2
D.C.	10	9	6	1	rehearing en banc pending
Total	475	448 (94%)	376 (84%)	27 (6%)	14 (52%)

Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev., 99 (1999);

The Americans with Disabilities Act of 1990, Titles I and V

EDITOR'S NOTE: The following is the text of Titles I and V of the Americans with Disabilities Act of 1990 (Pub. L. 101-336) (ADA), as amended, as these titles appear in volume 42 of the United States Code, beginning at section 12101. Title I of the ADA, which became effective for employers with 25 or more employees on July 26, 1992, prohibits employment discrimination against qualified individuals with disabilities. Title I will apply to employers with 15 or more employees beginning on July 26, 1994. Title V contains miscellaneous provisions which apply to EEOC's enforcement of Title I. The Civil Rights Act of 1991 (Pub. L. 102-166) (CRA) amends sections 101(4), 102 and 509 of the ADA. These amendments appear in boldface type. In addition, section 102 of the CRA (which is printed elsewhere in this publication) amends the Revised Statutes by adding a new section following section 1977 (42 U.S.C. 1981) to provide for the recovery of compensatory and punitive damages in cases of intentional violations of Title VII, the Americans with Disabilities Act of 1990, and section 501 of the Rehabilitation Act of 1973. Cross references to the ADA as enacted appear in italics following each section heading. Editor's notes also appear in italics.

Be it enacted by the Senate and House of Representatives of the United States of America assembled, that this Act may be cited as the "Americans with Disabilities Act of 1990".

FINDINGS AND PURPOSES

SEC. 12101. [Section 2]

(a) Findings. - The Congress finds that-

(1) some **43,000,000 Americans** have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of **discrimination against individuals with disabilities continue to be a serious and pervasive social problem;**

(3) **discrimination against individuals with disabilities persists** in such critical areas as **employment,** housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no **legal recourse to redress such discrimination;**

(5) **individuals with disabilities continually encounter various forms of discrimination,** including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, **exclusionary qualification standards** and criteria, segregation, and relegation to lesser services, programs, activities, **benefits, jobs, or other opportunities;**

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are **severely disadvantaged** socially, **vocationally,** economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goal regarding individuals with disabilities are **to assure equality of opportunity,** full participation, independent living, and **economic selfsufficiency for such individuals;** and

(9) **the continuing existence of unfair and unnecessarydiscrimination and prejudice** denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from **dependency and nonproductivity**.

(b) Purpose. - It is the purpose of this chapter-

(1) to provide a **clear and comprehensive** national mandate for the **elimination of discrimination against individuals with disabilities;**

(2) to provide **clear, strong, consistent, enforceable standards** addressing discrimination against individuals with disabilities;

(3) to ensure that the **Federal Government** plays a central role in enforcing the standards established in this chapter on **behalf of individuals with disabilities**; and

(4) to invoke the sweep of congressional authority, including the **power to enforce the fourteenth amendment** and to regulate commerce, in order to address the major areas of discrimination faced day–to-day by people with disabilities.